

US COVID-19: FFCRA IMPLICATIONS OF SCHOOL REOPENING PLANS

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With school reopening plans currently a hot topic across the country, a natural corollary is: What do those plans mean for employee requests for leave to care for a child under the Families First Coronavirus Response Act (“FFCRA”)? Under the FFCRA regulations and previous guidance issued by the Department of Labor (“DOL”), the answer appears to be that if a child’s school is physically open and the child is permitted by the school to attend in person, then any personal choice by the child’s parents to instead have the child participate in remote schooling will not provide a qualifying reason for FFCRA leave.

The FFCRA entitles eligible employees of covered employers to take up to two weeks of Paid Sick Leave, and up to ten additional weeks of Expanded FMLA leave, when the employee is unable to work (including telework) due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19 (“Child Care Leave”). See <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>; 29 CFR §§ 826.20(a)(v), (b).

Early on during the pandemic, the DOL made clear through its [Q&A guidance](#) that Child Care Leave is available when instruction has moved entirely online, due to the physical location of a school being closed:

70. My child’s school or place of care has moved to online instruction or to another model in which children are expected or required to complete assignments at home. Is it “closed”?

Yes. If the physical location where your child received instruction or care is now closed, the school or place of care is “closed” for purposes of paid sick leave and expanded family and medical leave. This is true even if some or all instruction is being provided online or whether, through another format such as “distance learning,” your child is still expected or required to complete assignments.

However, the focus on “physical location” suggests that, if a school building is physically open this fall, and students are invited by the school district to return to school in person, then a choice by the

parent/employee to instead select a remote learning option (if offered) will not result in the employee having a qualifying reason for Child Care Leave under the FFCRA. This is because in-person learning is available; i.e., the school building itself is not closed or unavailable. This would be true even if the employee's choice is based on a COVID-19 concern.^[1]

Recommendations:

- When an employee requests FFCRA leave relating to the need to care for a child, be sure to understand the underlying reason for the request.
- If the employee is requesting Child Care Leave (i.e., leave due to the child's school being closed or unavailable for reasons relating to COVID-19), ask follow-up questions as necessary, e.g.: Is the child's school actually closed? Does the employee have a choice to send the child to school in person, but instead is exercising a choice to have the child engage in remote learning?
- Require the employee to support the need for Child Care Leave under the FFCRA with appropriate information and documentation, i.e.:
 - A statement that the employee is unable to work (including, if applicable, telework) because the employee is caring for the employee's son or daughter because his/her school is closed or unavailable due to COVID-19, and no other person will be providing care for the child during the period for which the employee is requesting leave;
 - The name(s) and age(s) of the child(ren) to be cared for;
 - The name(s) of the school(s) that are closed or unavailable;
 - If the child is older than 14 and care will be provided during daylight hours, a description of the special circumstances that require the employee to provide care to the child; and
 - A copy of the applicable notice(s) of closure or unavailability from the school, such as a notice published on the school website or emailed to the employee from an official of the school.
- Track use of FFCRA leave carefully, so that you are aware of whether and when an employee has exhausted his or her FFCRA leave entitlement.
- Remember that, as of now, the right to FFCRA leave expires at the end of 2020.
- Be prepared to discuss any other leave options an employee may have, if leave under the FFCRA is not applicable or available.

BCLP has assembled a COVID-19 HR and Labor & Employment taskforce to assist clients with labor and employment issues across various jurisdictions. You can contact the taskforce at: COVID-19HRLabour&EmploymentIssues@bclplaw.com. You can also view other thought leadership, guidance, and helpful information on our dedicated COVID-19 / Coronavirus resources page at <https://www.bclplaw.com/en-GB/topics/covid-19/coronavirus-covid-19-resources.html>

[1] It should be noted, however, that, if the child’s health care provider advises the child to self-quarantine, and if the parent is needed to care for the child during that quarantine, the parent may be entitled to up to two weeks of Paid Sick Leave under the FFCRA for that separate qualifying reason. See <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>.

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